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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2004

RONALD W. ROBERTI,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari
to the Florida Second District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether Petitioner Roberti's sentences violated his Sixth Amendment right to a jury trial when the Florida state trial court sentenced Petitioner Roberti based on a victim injury/sexual contact enhancement – an enhancement that was not charged in the charging information, found beyond a reasonable doubt by the jury, or admitted to by Petitioner Roberti. *See Blakely v. Washington*, 542 U.S. –, 124 S. Ct. 2531 (2004).

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

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Case No. _____

IN THE

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October Term, 2004

RONALD W. ROBERTI,
Petitioner,

v.

STATE OF FLORIDA,
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On Petition for Writ of Certiorari to the Florida Second District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Ronald W. Roberti, respectfully prays the Court to issue its writ of certiorari to review the judgment of the Florida Second District Court of Appeal entered in this case on December 17, 2004, (A-1), rehearing and rehearing *en banc* denied on January 24, 2005 (A-2).

D. CITATIONS TO OPINION BELOW

Roberti v. State of Florida, Case No. 2D04-24 (Fla. 2d DCA 2004).

E. BASIS FOR JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the Florida Second District Court of Appeal rendered on December 17, 2004 (A-1), rehearing and rehearing *en banc* denied on January 24, 2005. (A-2).

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Provision

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

2. Statutory Provisions

Florida Sentencing Guidelines, §§ 921.001 - 921.0017, Fla. Stat. (reproduced in the Appendix, A-5).

G. STATEMENT OF THE CASE

Petitioner Roberti was charged by information in Manatee County, Florida, with two counts of handling or fondling a child under sixteen in a lewd, lascivious, or indecent manner (Counts I and II)[1] and one count of sexual battery by a person over eighteen upon a child less than twelve years of age (Count III). (R1-10).[2] On May 3, 1999, Petitioner Roberti entered pleas of no contest to Counts I and II and a plea of no contest to an amended charge of *attempted* sexual battery on Count III.[3] (R1-13-17). Throughout the sentencing

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[1] Handling or fondling a child under sixteen in a lewd, lascivious, or indecent manner is prescribed by section 800.04(1), Florida Statutes. Under Florida law, a violation of section 800.04(1) is a second-degree felony, punishable by a maximum of fifteen years' imprisonment. *See* § 775.082(3)(c), Fla. Stat.

[2] References to the state court record on appeal will be made by the designation "R" followed by the appropriate volume number and page number.

[3] Attempted sexual battery by a person eighteen years of age or older upon a child less than twelve years of age is prescribed by section 794.011(2), Florida Statutes, and section 777.04, Florida Statutes. Under Florida law, attempted sexual battery by a person eighteen years of age or older upon a child less than twelve years of age is a first-degree felony, punishable by a maximum of thirty years' imprisonment. *See* § 777.04(4)(b), Fla. Stat.; § 775.082(3)(b), Fla. Stat.

hearing, the prosecutor and defense counsel referred to Petitioner Roberti's sentences as "guideline sentences." (R1-83, 85).[4] Petitioner Roberti was sentenced pursuant to the Florida Sentencing Guidelines, sections 921.001 - 921.0017, Florida Statutes. On the sentencing scoresheet, Petitioner Roberti was assessed forty points for victim injury (sexual contact) for the attempted sexual battery count. (A-3).[5] The trial court sentenced Petitioner Roberti on all counts to a term of seventeen years' imprisonment followed by ten years of probation. (R1-20). The sentences on all three counts were to run concurrently. (R1-25). Petitioner Roberti did not appeal the

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[4] Defense counsel specifically stated, "This is a guideline sentence." (RI -85). Florida courts have consistently reversed for new sentencing proceedings when a negotiated plea was a "guideline sentence" in reliance on an unconstitutional sentencing scoresheet. *See, e.g., Heggs v. State of Florida*, 759 So. 2d 620 (Fla. 2000) (holding the 1995 version of the Florida Sentencing Guidelines unconstitutional in violation of the single subject provision of the Florida Constitution); *Bonilla v. State of Florida,* 766 So. 2d 1192, 1193 (Fla. 5th DCA 2000) ("If the trial court finds that the plea agreement was conditioned on a guidelines sentence, the trial court should [afford the defendant the benefit of *Heggs*].").

[5] Petitioner Roberti was also assessed eighty victim injury points for the two counts of handling or fondling a child under sixteen in a lewd, lascivious, or indecent manner (forty points for each count). (A-3).

judgment or sentences.

On September 30, 2002, Petitioner Roberti filed a *pro se* motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a).[6] (R2-235). In the motion, Petitioner Roberti claimed that the trial court illegally sentenced him in excess of the statutory maximum authorized by Florida law for Counts I and II. (R2-237). The State conceded that Petitioner Roberti's sentences were illegal because the sentences exceeded the statutory maximums. (R2-269-70). On January 24, 2003, the trial court granted Petitioner Roberti's motion, acknowledging that his sentences were illegal. (R2-288).

Pursuant to the trial court's January 24, 2003 order, Petitioner Roberti was resentenced on December 5, 2003. (R3-454). At the conclusion of the resentencing hearing, the trial court sentenced Petitioner Roberti to fifteen years' imprisonment on Counts I and II (the statutory maximum for a second-degree felony).

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[6] Florida Rule of Criminal Procedure 3.800(a) permits a defendant to file a motion in the trial court claiming that his or her sentence is illegal. The motion can be filed at any time.

(R3-481). The trial court reimposed the original sentence on Count III – seventeen years' imprisonment followed by ten years' probation. (R3-481). The sentences on all three counts were imposed concurrently. (R3-481). Petitioner Roberti timely appealed the new sentences to the Florida Second District Court of Appeal.

After the appellate briefs were filed by the parties, the Court issued its opinion in *Blakely v. Washington*, 542 U.S. –, 124 S. Ct. 2531 (2004). Petitioner Roberti subsequently filed a motion to submit a supplemental brief arguing that the Florida Sentencing Guidelines are facially unconstitutional in light of *Blakely* (an issue that can be raised under Florida law for the first time on appeal even if it was not preserved in the trial court).[7] Petitioner Roberti also sought leave to file a motion to correct sentencing error in the trial court in order to argue that Petitioner Roberti's sentences were unconstitutional "as applied" in light of *Blakely* (an issue that can

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[7] *See Brannon v. State of Florida*, 850 So. 2d 452, 459 (Fla. 2003) (holding that a fundamental or "plain" error arising from the facial unconstitutionality of a sentencing statute may be raised for the first time on appeal).

only be raised on appeal if first presented to the trial court).[8] The

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[8] *See* Fla. R. Crim. P. 3.800(b)(2). Rule 3.800(b)(2) provides that an "as applied" sentencing error is barred from consideration on appeal in Florida unless the error was first presented to the trial court. Under Florida law, a defendant on appeal can preserve a sentencing error that was not previously preserved by filing a rule 3.800(b)(2) motion in the trial court. However, a rule 3.800(b)(2) motion can only be filed in the trial court *prior* to the time that the initial brief is filed in the appellate court. This procedural bar contained in rule 3.800(b)(2) applies regardless of whether the sentencing error is fundamental or "plain." Rule 3.800(b)(2) was adopted in 2000. Prior to the adoption of rule 3.800(b)(2), a defendant could raise an unpreserved sentencing error on appeal by arguing that the error was fundamental or "plain."

In his motion to the Florida Second District Court of Appeal seeking leave to file a motion to correct sentencing error in the trial court raising the *Blakely* claim, Petitioner Roberti claimed that the drafters of rule 3.800(b)(2) did not envision a scenario whereby a sentencing error becomes apparent for the first time after the initial brief is filed due to a change in the law. In Petitioner Roberti's case, the *Blakely* opinion was released after Petitioner Roberti filed his initial brief. Had *Blakely* been issued prior to the briefs in Petitioner Roberti's case, Petitioner Roberti would have been entitled to file a rule 3.800(b)(2) motion, thereby preserving the issue for appeal.

To the extent that rule 3.800(b)(2) prohibits a defendant from raising a sentencing issue on appeal that only becomes apparent after the initial brief is filed due to a change in the law, Petitioner Roberti submits that rule 3.800(b)(2) violates his constitutional right to appeal and his right to due process. *See* U.S. Const. Amend. XIV ("[N]o state shall . . .deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."). Although there may be no federal right to an appeal from a criminal conviction; *see Griffin v. Illinois*, 351 U.S. 12, 18 (1956); once a state grants

Florida Second District Court of Appeal granted Petitioner Roberti's request to file a supplemental brief concerning the facial unconstitutionality of the Florida Sentencing Guidelines in light of

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criminal defendants the right to appeal, the procedures it uses must conform to due process of the law. *See North Carolina v. Pearce*, 395 U.S. 711, 724-25 (1969); *Griffin*, 351 U.S. at 18.

Petitioner Roberti's case was pending on appeal (and is still pending) when *Blakely* was released. In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), the Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." In *United States v. Booker*, – U.S. –, 125 S. Ct. 738 (2005), a case involving the application of *Blakely* to the federal sentencing guidelines, the Court reaffirmed that the remedy in *Blakely* applies retroactively to all cases pending on appeal:

> As these dispositions indicate, today's Sixth Amendment holding and the Court's remedial interpretation of the Sentencing Act must be applied to all cases on direct review.

Booker, – U.S. –, 125 S. Ct. at 769. Although the *Blakely* error in the instant case was not preserved at the sentencing hearing, Petitioner Roberti submits that the error was fundamental or "plain." *See United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005) (holding that *Blakely* error was plain in the context of the federal sentencing guidelines); *United States v. Davis*, 397 F.3d 173, 183 (3d Cir. 2005) (same); *United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005) (same); *United States v. Milan*, 398 F.3d 445 (6th Cir. 2005) (same); *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005) (same); *United States v. Ameline*, 400 F.3d 646 (9th Cir. 2005) (same).

Blakely. However, the Florida Second District Court of Appeal denied Petitioner Roberti's request to file the motion to correct sentencing error raising the "as applied" claim. The parties subsequently filed supplemental briefs addressing the effect of *Blakely* on Petitioner Roberti's case.[9] Thereafter, the Florida Second District Court of Appeal affirmed Petitioner Roberti's sentences without issuing a written opinion. (A-1).

Petitioner Roberti timely filed a motion for rehearing and a motion for rehearing *en banc*. On January 24, 2005, the Florida Second District Court of Appeal denied both motions. (A-2). Petitioner Roberti remains incarcerated.

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[9]Petitioner Roberti's supplemental brief addressed both the facial and "as applied" constitutional challenges to the Florida Sentencing Guidelines, specifically claiming the Florida Sentencing Guidelines violated Petitioner Roberti's Sixth Amendment right to a trial by jury. *See* Sup. Ct. R. 14(1)(g)(i). The federal question was therefore timely and properly raised and this Court has jurisdiction to review the judgment on a writ of certiorari.

H. REASONS FOR GRANTING THE WRIT

1. The Decision Below is Incorrect and is in Conflict With This Court's Opinion in *Blakely v. Washington*, 542 U.S. –, 124 S. Ct. 2531 (2004).

a. The Florida Sentencing Guidelines are facially unconstitutional.

In light of the Court's recent decision in *Blakely v. Washington*, 542 U.S. –, 124 S. Ct. 2531 (2004), Petitioner Roberti submits that the Florida Sentencing Guidelines, sections 921.001 - 921.0017, Florida Statutes, are facially unconstitutional. In *Blakely*, the Court held unconstitutional any system of sentencing guidelines that permits or mandates a sentencing judge to increase a defendant's sentence upon a finding of a fact not found by the jury beyond a reasonable doubt. The *Blakely* decision renders infirm the Florida sentencing system under which Petitioner Roberti's sentences were calculated. Accordingly, the Florida Sentencing Guidelines should be struck down as facially unconstitutional and Petitioner Roberti's case should be remanded to the state court for a new sentencing proceeding without reliance on the unconstitutional Sentencing

Guidelines.[10] Alternatively, this case should be remanded to the Florida courts to determine whether the unconstitutional portions of

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[10] Petitioner Roberti's case is before the Court on direct appeal after he was resentenced pursuant to a successful Florida Rule of Criminal Procedure 3.800(a) motion. In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), the Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Petitioner Roberti's direct appeal was (and still is) pending when *Blakely* was released. Pursuant to *Griffith*, and because Petitioner Roberti's case is pending on direct appeal, Petitioner Roberti is entitled to the benefit of the *Blakely* decision.

In support of his argument, Petitioner Roberti relies on *King v. State of Florida*, 795 So. 2d 1086 (Flat. 1st DCA 2001). In *King*, the Florida appellate court considered an appeal from a new sentence imposed after the defendant successfully obtained postconviction relief. The Florida court held that the appeal from the resentencing should not be treated as a postconviction appeal. *See King*, 795 So. 2d at 1087. Rather, the Florida court held that the appeal should be treated "as a *direct appeal* from the new sentence." *Id.* (emphasis added). *See also Payne v. State of Florida*, 722 So. 2d 836, 836 (Fla. 2d DCA 1998) ("Until Payne is resentenced [pursuant to rule 3.800(a)], the case is not ripe for review by *direct appeal*. . . .") (emphasis added); *Bines v. State of Florida*, 837 So. 2d 1146, 1147 (Fla. 1st DCA 2003) ("The second [notice of appeal] was on an order granting a motion to correct sentencing error filed pursuant to rule 3.800(a). The third [notice of appeal] was directed toward the resentencing that stemmed from the granting of that rule 3.800(a) motion. These latter notices of appeal were redesignated by this Court as a *direct appeal* from the resentencing.") (emphasis added).

the Florida Sentencing Guidelines can be severed from the remainder of the Guidelines or whether the Florida Sentencing Guidelines are unconstitutional *in toto*.

In *Blakely*, the Court found that the State of Washington's sentencing scheme violated the right to a jury trial guaranteed by the Sixth Amendment to the Constitution. In that case, the defendant, Ralph Blakely, pleaded guilty to kidnaping his estranged wife. The facts he admitted to in his plea justified, under the Washington Guidelines, a maximum sentence of fifty-three months' imprisonment. However, because at sentencing the judge found that Mr. Blakely had committed the offense with "deliberate cruelty," the court imposed a sentence of ninety months' imprisonment. *See Blakely*, 542 U.S. –, 124 S. Ct. at 2535. The judge imposed the longer sentence pursuant to a provision of the Washington Guidelines that allowed the judge to impose a greater sentence if the judge found "substantial and compelling reasons justifying an exceptional sentence." *Id.* The guideline statute listed a variety of factors that justified an exceptional sentence, including that of acting with "deliberate cruelty." *Id.*. Under Washington law, the maximum

penalty for the offense was ten years' imprisonment. Nevertheless, this Court found that a sentence in excess of the *guideline range* was unconstitutional to the extent that the sentence was based on a fact not charged in the charging document and not proven beyond a reasonable doubt to a jury:

> Our precedents make clear, however, that *the* "statutory maximum" for *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000),] purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See Ring* [*v. Arizona*, 536 U.S. 584,] 602 [(2002)] ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting *Apprendi*, 530 U.S. at 483); *Harris v. United States*, 536 U.S. 545, 563 (2002) (plurality opinion) (same); *cf. Apprendi, supra*, at 488 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [1 J.] Bishop, [Criminal Procedure] § 87, at 55 [(2d ed. 1872)], and the judge exceeds his proper authority.

Blakely, 542 U.S. –, 124 S. Ct. at 2537.

The reasoning of *Blakely* applies to the Florida determinate

guideline scheme in effect at the time of Petitioner Roberti's offense.[11] The Florida Sentencing Guidelines, found in sections 921.001 - 921.0017, Florida Statutes, require that a scoresheet be prepared in every case before a court for sentencing. *See* § 921.001, Fla. Stat. (A-5). Points are scored for various factors on the scoresheet. *See* § 921.0014, Fla. Stat. (A-39). The sum of all of the points is referred to as the "total sentence points." *See* § 921.0014(1)(b), Fla. Stat. (A-42). Twenty-eight points are then subtracted from this sum, and the resulting total is the "recommended range." *See* § 921.0014(2), Fla. Stat. (A-44). The trial judge is then given the discretion to increase or decrease the recommended range

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[11] The offense in Petitioner Roberti's case was allegedly committed on July 24, 1998. On October 1, 1998, the Florida Legislature adopted the Florida Criminal Punishment Code, sections 921.002 - 921.0027, Florida Statutes. One of the main features of the Criminal Punishment Code was the elimination of a guideline maximum sentencing range; under the Criminal Punishment Code, the maximum guideline range is the maximum statutory range (unless the minimum guideline range exceeds the statutory maximum, in which case the minimum guideline range must be imposed). *See* § 921.0024(2), Fla. Stat. Because Petitioner Roberti's offense was allegedly committed prior to the enactment of the Criminal Punishment Code, Petitioner Roberti's sentences were not calculated pursuant to the Criminal Punishment Code.

by twenty-five percent (the "discretionary sentencing range"). *See* § 921.0014(2), Fla. Stat. (A-44). Absent mitigating or aggravating factors, the trial judge must impose a sentence within the guideline sentencing ranges. *See* § 921.0016, Fla. Stat. (A-47).

A Florida Sentencing Guidelines scoresheet contains a "victim injury" section wherein victim injury points can be assessed. In the case of an alleged sexual offense, victim injury points include points for sexual penetration or sexual contact. *See* § 921.0014(1)(a), Fla. Stat. (A-39).[12] Pursuant to Florida case law, victim injury points need only be established by a mere "preponderance of the evidence." *Gilson v. State of Florida*, 795 So. 2d 105, 110 (Fla. 4th DCA 2001). The court in *Gilson* specifically held that victim injury points need not be charged in the information, proven beyond a reasonable doubt to the jury, or admitted by the defendant pursuant to a plea agreement:

> However, any fact which, if proved, provides for a higher sentence within the prescribed bounds need

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[12] Other types of victim injury points include death, severe injury, moderate injury, and slight injury. *See* § 921.0014(1)(a), Fla. Stat. (A-39).

> not be proved to a jury to a constitutional certainty. Instead, these sentencing factors may be determined by a judge by a preponderance of the evidence.

795 So. 2d at 110. It is clear that the *Gilson* court's understanding of "prescribed bounds" was incorrect in light of *Blakely*. Accordingly, the "victim injury" section of the Florida Sentencing Guidelines scoresheet violates the Sixth Amendment right to a jury trial on the truth of those enhancement factors and the Fifth and Fourteenth Amendment rights to due process requiring that such factors be charged in the charging document and found beyond a reasonable doubt. Pursuant to *Blakely*, the "victim injury" section of the Florida Sentencing Guidelines is facially unconstitutional.

Additionally, under the Florida Sentencing Guidelines, the trial court can impose a departure sentence based on aggravating factors found by a mere preponderance of the evidence:

> A court may impose a departure sentence outside the sentencing guidelines based upon circumstances or factors which reasonably justify the aggravation or mitigation of the sentence in accordance with s. 921.0016. *The level of proof necessary to establish facts supporting a departure from a sentence under the guidelines is a preponderance of the evidence.* When multiple reasons exist to support a departure from a guidelines sentence, the departure shall be

> upheld when at least one circumstance or factor justifies the departure regardless of the presence of other circumstances or factors found not to justify departure. Any sentence imposed outside the range recommended by the guidelines must be explained in writing by the trial court judge.

§ 921.001(6), Fla. Stat. (emphasis added). *See also* § 921.001(7), Fla. Stat. This provision of the Florida Sentencing Guidelines is identical to the provision in the Washington Guidelines that was struck down by the Court in *Blakely*. Pursuant to *Blakely*, sections 921.001(6) & (7) of the Florida Sentencing Guidelines are facially unconstitutional.

The strongest support for Petitioner Roberti's argument is found in the *Blakely* opinion itself. In *Blakely*, Justice O'Connor specifically recognized that the Florida Sentencing Guidelines are unconstitutional in light of *Blakely*:

> The consequences of today's decision will be as far reaching as they are disturbing. Washington's sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal Government. . . . Today's decision casts constitutional doubt over them all and, in so doing, threatens an untold number of criminal judgments. Every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy.

Blakely, 542 U.S. –, 124 S. Ct. at 2548-49 (O'Connor, J., dissenting). Justice O'Connor proceeded to cite to section 921.0016, Florida Statutes, as an example of a state's sentencing guidelines affected by *Blakely*. *See id.*[13]

For the reasons expressed above and pursuant to *Blakely*, there are sections of the Florida Sentencing Guidelines that are facially unconstitutional. To remedy the error, one possible solution is to permit Petitioner Roberti to be resentenced without regard for the unconstitutional portions of the Florida Sentencing Guidelines and without reliance on the victim injury section of the Florida Sentencing Guideline scoresheet. This is the result that the Court mandated in *Blakely*, which, as explained above, is factually indistinguishable from Petitioner Roberti's case.

Another solution may be that the Florida Sentencing Guidelines are declared unconstitutional *in toto*, because it is not clear whether the unconstitutional portions of the Florida Sentencing

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[13] Notably, Justice O'Connor also forecasted that the federal sentencing guidelines would be affected by *Blakely* – a prediction which came true in *United States v. Booker*, – U.S. –, 125 S. Ct. 738 (2005).

Guidelines can be severed from the remainder of the Guidelines. A similar issue was recently addressed by the Court in *United States v. Booker*, – U.S. –, 125 S. Ct. 738 (2005), (i.e., whether *Blakely* renders the federal sentencing guidelines unconstitutional *in toto)*. The federal sentencing guidelines also encompass a determinate sentencing scheme, similar to that employed in Florida. In *Booker*, the Court declared that the principles described in *Blakely* apply with equal force to the federal sentencing guidelines. The Court noted that by virtue of 18 U.S.C. § 3553(b)(1), "[t]he [federal] Guidelines as written . . . are not advisory; they are mandatory and binding on all judges" and therefore "have the force and effect of laws." *Id.* at –, 125 S. Ct. at 750. In light of the binding nature of the federal sentencing system, the Court found no distinction of constitutional significance between the federal guidelines and the state sentencing regime it evaluated and found wanting in *Blakely*. *See id.* at –, 125 S. Ct. at 749. Having determined that the federal sentencing regime was unconstitutional, the Court next decided upon an appropriate remedial scheme that would best effectuate Congress' intent in passing the Sentencing Reform Act in light of the Court's

constitutional holding. *See id.* at –, 125 S. Ct. at 757. The Court ruled that Congress would have preferred a solution that rendered the federal guidelines advisory and restored discretion to courts to impose sentences within the range prescribed by the statutes of conviction, *id.* at –, 125 S. Ct. at 766, as long as those sentences are "reasonable," *see id.* at –, 125 S. Ct. at 765. The Court therefore severed and excised the provisions of the Sentencing Reform Act that mandated sentencing and appellate review in conformance with the federal guidelines, *see id.* at –, 125 S. Ct. at 764-65 (severing and excising 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e)[14]), thereby rendering the federal guidelines "effectively advisory." *Id.* at –, 125 S. Ct. at 757.

Petitioner Roberti suggests that either the Florida Supreme Court or the Florida Second District Court of Appeal (the court below) is in the best position to decide whether the unconstitutional portions of the Florida Sentencing Guidelines can be severed from

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[14] 18 U.S.C. 3742(e) set forth standards of review on appeal, including *de novo* review of departures from the applicable federal guidelines range.

the remainder of the Florida Guidelines (as in *Booker*) or whether the Florida Guidelines are unconstitutional *in toto*. Petitioner Roberti respectfully requests the Court to remand this case to the Florida courts to formulate an appropriate remedy, just as the Court did in *Booker*.

b. The Florida Sentencing Guidelines are unconstitutional "as applied" to Petitioner Roberti's case.

In addition to his argument that the Florida Sentencing Guidelines are facially unconstitutional, Petitioner Roberti also submits that the Florida Sentencing Guidelines are unconstitutional as applied to his case. Petitioner Roberti entered a plea to *attempted* sexual battery by a person over eighteen upon a child less than twelve years of age. The sentencing scoresheet prepared in Petitioner Roberti's case assessed forty victim injury points (sexual contact) for the attempted sexual battery count. Pursuant to *Blakely*, it was error to include victim injury points for the crime of attempted sexual battery, as Petitioner Roberti did not admit to sexual contact when he entered his plea for that offense. An admission to an attempt is not an admission to the completed offense.

It was also error to impose sexual contact points for the handling or fondling a child under sixteen in a lewd, lascivious, or indecent manner counts (hereinafter "fondling counts"). Petitioner Roberti was charged with the fondling counts pursuant to section 800.04(1), Florida Statutes. *Blakely* holds that a sentencing factor may only be imposed if the facts supporting the aggravating factor are "admitted" by the defendant. *See Blakely,* 542 U.S. at –, 124 S. Ct. at 2537. At the sentencing hearing, Petitioner Roberti entered a plea to both fondling counts, but he specifically denied the facts alleged in support of the counts and he denied any "sexual contact." After the prosecutor explained the factual basis in support of the counts, the following occurred:

> THE COURT: Mr. Lipinski (defense counsel), do you stipulate that the State could prove a prima facie case in each count?
>
> MR. LIPINSKI: Yes, I do believe that they can put a prima facie case together. We certainly do not stipulate to those facts in any shape or form. In fact, we disagree with many of them, but we are sufficiently apprised of the facts to realize that it would go to the jury.

(R1-97).[15] Pursuant to *Blakely,* in order for victim injury points for sexual contact to be scored for the two fondling counts, Petitioner Roberti must be brought back to the state trial court and asked to

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[15] The Florida Statutes include the touching of a person's buttocks within the definition of lewd and lascivious molestation. *See* § 800.04(5)(a), Fla. Stat. However, in *Borjas v. State of Florida,* 790 So. 2d 1114 (Fla. 4th DCA 2001), the Florida appellate court held that while the touching of the buttocks is sufficient to support a fondling conviction, it is not sufficient to support the scoring of "sexual contact" victim injury points. In *Fretwell v. State of Florida,* 852 So. 2d 292, 293 (Fla. 4th DCA 2003), the Florida appellate court explained that *Borjas* involved the pre-1999 fondling statute and that prior to 1999, the statute was vague regarding what constituted "sexual contact" and therefore sexual contact "does not include the touching of a victim's buttocks." The Florida appellate court acknowledged that the Florida Legislature amended section 800.04 in 1999 and "for the first time defined in detail the forms of touching proscribed as molestation under the statute" and specifically included the touching of a victim's buttocks within that definition. *Id.*

The fondling counts in Petitioner Roberti's case took place prior to the 1999 statutory changes and therefore *Borjas* applies. Because Petitioner Roberti did not admit to underlying facts of the fondling counts and did not admit to "sexual contact," and giving the benefit of the doubt to Petitioner Roberti pursuant to the rule of lenity, it must be assumed that Petitioner Roberti admitted, at most, that he touched the alleged victim on the buttocks. *See Wallace v. State of Florida,* 860 So. 2d 494, 497-98 (Fla. 4th DCA 2003) ("Application of [the] rule [of lenity] means that if there is a reasonable construction of a penal statute favorable to the accused, the court must employ that construction."); § 775.021(1), Fla. Stat. Based on *Borjas,* touching the buttocks does not constitute sexual contact. Pursuant to *Blakely,* it was improper to impose victim injury points for sexual contact for either of the fondling counts.

admit that the counts involved sexual fondling of more than the victim's buttocks. *See* footnote 15. *Cf Blakely,* 124 S. Ct. at 2534-35 ("Petitioner entered a guilty plea admitting the elements of second-degree kidnaping and the domestic-violence and firearm allegations, *but no other relevant facts.*") (emphasis added). If Petitioner Roberti does not make this admission, then Petitioner Roberti acknowledges that the State of Florida should be permitted to withdraw the plea agreement and proceed to trial.

Accordingly, pursuant to *Blakely*, it was error to include points for victim injury on Petitioner Roberti's sentencing scoresheet. As a result of the victim injury points, 120 points were added to Petitioner Roberti's sentencing scoresheet, resulting in 268 total sentence points, a recommended imprisonment range of 240 months, and a discretionary sentencing range of 180 to 300 months' imprisonment. (A-4). After subtracting the improper 120-point assessment,[16] Petitioner Roberti's total sentence points should have

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[16] Petitioner Roberti submits that all of the victim injury points were improperly scored in light of *Blakely*. However, even if just the points for the attempted sexual battery were erroneously scored, Petitioner Roberti's case would still be required to be

remanded for a new sentencing proceeding with a corrected scoresheet. In *Anderson v. State of Florida,* 865 So. 2d 640 (Fla. 2d DCA 2004), the Florida appellate court considered whether an error on the sentencing scoresheet required a remand for a new sentencing proceeding with a corrected scoresheet. In *Anderson,* the defendant's primary offense was miscalculated. The trial court denied Anderson's claim, ruling that Anderson was not adversely affected by the scoresheet error because the sentence previously imposed was within the corrected range. The Florida appellate court reversed, holding that the defendant was entitled to a new sentencing proceeding with a corrected scoresheet:

> [W]e have adhered to the view that a scoresheet error, like the error shown by Anderson, requires resentencing unless it can be shown conclusively that the same sentence would have been imposed if the corrected scoresheet had been used by the sentencing court. *See also Sprankle v. State* [*of Florida*], 662 So. 2d 736, 737 (Fla. 2d DCA 1995) (holding that scoresheet error was basis for relief under motion to correct illegal sentence even where sentence imposed using incorrect scoresheet was "still within the permitted range of punishment" under the correct scoresheet and stating that "[w]hen a corrected scoresheet places the defendant in a different cell, the error cannot be presumed to be harmless, unless the record conclusively demonstrates that the trial court would have given the same sentence had it known the correct score").

Anderson, 865 So. 2d at 642. Moreover, Petitioner Roberti's sentences for all three counts were calculated using a single scoresheet. If the scoresheet was unconstitutional pursuant to *Blakely* (either facially or as applied), then Petitioner Roberti is entitled to a new sentencing proceeding without reliance on the

been 148, and the recommended prison sentence should have been 120 months. The discretionary sentencing range should have been 150 months to 90 months' imprisonment. The sentences for all three counts imposed by the state trial court exceeded 150 months' imprisonment and therefore the sentences are unconstitutional under *Blakely*. As explained above, Petitioner Roberti respectfully requests that his case be remanded to the trial court for a new sentencing proceeding consistent with *Blakely*. Alternatively, Petitioner Roberti requests that the Court remand this case to the Florida courts to determine whether the unconstitutional portions of the Florida Sentencing Guidelines can be severed from the remainder of the Guidelines or whether the Florida Sentencing Guidelines are unconstitutional *in toto*.

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unconstitutional scoresheet. It is impossible to separate one count from the others when all three counts were scored on the same scoresheet.

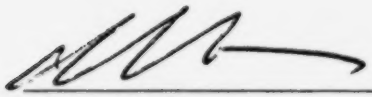
2. The Issue Presented is Recurring in Florida and is of Great Practical Importance.

Petitioner Roberti submits that his case is the proper case to determine whether the Florida Sentencing Guidelines remain valid after *Blakely*. As of the date of this petition, no Florida court has ruled on the facial constitutionality of the Florida Sentencing Guidelines. Just as it was important for the Court to immediately rule on the constitutionality of the federal sentencing guidelines in light of *Blakely*, *see Booker*, Petitioner Roberti suggests that it is appropriate for the Court to rule on the constitutionality of the Florida Sentencing Guidelines in light of *Blakely*. The issue is recurring in Florida for those offenses that occurred prior to October 1, 1998 (i.e., prior to the enactment of the Florida Criminal Punishment Code, sections 921.002 - 921.0027, Florida Statutes). The issue is also one of great practical importance, as Florida judges need guidance regarding the continued viability of the Florida Sentencing Guidelines after *Blakely*.

I. CONCLUSION

Petitioner Roberti respectfully requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,



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COUNSEL FOR PETITIONER

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2004

RONALD W. ROBERTI,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

Appendix to
Petition for Writ of Certiorari
to the Florida Second District Court of Appeal

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

RONALD W. ROBERTI,

Appellant,

v. Case No. 2D04-24

STATE OF FLORIDA,

Appellee.

Opinion filed December 17, 2004.

Appeal from the Circuit Court for Manatee County; Janette Dunnigan, Judge.

Robert Augustus Harper of Robert Augustus Harper Law Firm, P.A., Tallahassee, for Appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Amanda Lea Colon, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

SALCINES, SILBERMAN, and VILLANTI, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

January 24, 2005

CASE NO.: 2D04-24
L.T. No. 1998CF2175

Ronald W. Roberti, v. State Of Florida,

Appellant / Petitioner(s), Appellee /Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing is denied.
Appellants motion for rehearing en banc is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:
Ronald W. Roberti
Amanda L. Colon, A.A.G.
Michael Robert Ufferman, Esq.

/s/ James Birkhold
James Birkhold
Clerk

BEST AVAILABLE COPY

OCTOBER 1, 1995 RULE 3.991(a) SENTENCING GUIDELINES SCORESHEET

DATE OF SENTENCE (MO DAY YR)	JUDGE	COUNTY	SENTENCING JUDGE
05 08 96	HAGOPIAN	Manatee	Dunnigan

NAME (LAST, FIRST, MI)	DOC #	DOB (MO DAY YR)	RACE	SEX
Roberti, Ronald W.		03 [illegible] 57	W B I O	M F

I. PRIMARY OFFENSE: If Qualifier, please circle: A S C R

DOCKET #	FELONY DEGREE	FS #	OFFENSE LEVEL	OFFENSE DATE (MO DAY YR)	POINTS
95-2175F	1-F	794.011(4)/777.04	08	01 [illegible] 95	

Description: Attempt 2nd Battery on P. Bar/ Inf. Ld by Fam. Over 18

(Level = Pts: 1=4, 2=10, 3=16, 4=22, 5=28, 6=36, 7=36, 8=28, 9=82, 10=116) .92

Prior capital felony triples primary offense points: —

II. ADDITIONAL OFFENSES: Supplemental page attached ☐

DOCKET #	FELONY DEGREE	FS #	OFFENSE LEVEL	QUALIFY A S C R	CNTS	POINTS
95-2175F	2-F	800.04(1)	7	0000	2 x 28	.56

Description: Unwilling Act Family child <16

_____ / _____ / _____ ____ 0000 ____ x ____ = ____

Description: _____

_____ / _____ / _____ ____ 0000 ____ x ____ = ____

Description: _____

(Level = Pts: 1=8.2, 2=14.7, 3=21.2, 4=27.6, 5=34.1, 6=40.6, 7=28.8, 8=67.4, 9=74.0, 10=203)

Prior capital felony triples additional offense points: —

Supplemental page points: ____ .56

III. VICTIM INJURY:

	Number	Total		Number	Total
2nd Degree Murder	300 x ____ =	____	Slight	4 x ____ =	____
Death	120 x ____ =	____	Sex Penetration	80 x ____ =	
Severe	40 x ____ =	____	Sex Contact	40 x 1 =	120
Moderate	16 x ____ =	____			

.120

IV. PRIOR RECORD: Supplemental page attached ☐

FELONY DEGREE	FS #	OFFENSE LEVEL	QUALIFY A S C R	DESCRIPTION	DATE	POINTS
____ / ____ / ____		____	0000	____	____ x ____ =	____
____ / ____ / ____		____	0000	____	____ x ____ =	____
____ / ____ / ____		____	0000	____	____ x ____ =	____
____ / ____ / ____		____	0000	____	____ x ____ =	____
____ / ____ / ____		____	0000	____	____ x ____ =	____

(Level = Pts: 1=8.2, 2=14.7, 3=21.2, 4=27.6, 5=34.1, 6=40.6, 7=47.4, 8=54.0, 9=60.5, 10=203)

Supplemental page points: ____ 0

Offense Date For offenses committed on or after October 1, 1995 — Page Subtotal .176

DISTRIBUTION: White (Original) / Clerk; Green / DC State; Canary / State Attorney; Pink / Defense Attorney; Goldenrod / DC Master File

FILED IN OPEN COURT THIS

000018

Page 1 Subtotal 268

V. Legal Status Violation = 4 Points — V. ____

VI. Community Sanction Violation before the court for sentencing
A) 6 Pts x each such successive violation OR
B) New Felony Conviction = 12 Pts x each such successive violation — VI. A ____ B ____

VII. Firearm Semi-Automatic or Machine Gun = 15 or 25 Points — VII. ____

VIII. Prior Serious Felony = 30 Pts — VIII. ____

IX. Enhancements ready of the primary offense qualifies for enhancement — Subtotal Sentence Points 268

Law Enforcement Protection	Drug Trafficking	Grand Theft Motor Vehicle
☐ x 1.5 ☐ x 2.0 ☐ x 2.5	☐ x 3	☐ x 1.5

Enhanced Subtotal Sentence Points IX. 268

TOTAL SENTENCE POINTS 268

SENTENCE COMPUTATION

• 40 or less total sentence points mandates a non-state prison sanction. Sentence points less than or equal to 40 may be increased by 15 percent.

_____ Total Sentence Points x 1.15 = _____ Increased Sentence Points

• If total or increased sentence points are greater than 40 or equal to 52, state incarceration is discretionary. A total of more than 52 total or increased sentence points must be a state prison sentence. A life sentence may be imposed at the discretion of the court if total sentence points are 363 or greater.

268 Total/Increased Points minus 28 = 240 State Prison Months

• The sentencing court may increase or decrease prison months by up to 25 percent credits where total sentence points were originally increased by 15 percent to exceed 40 points. Any state prison sentence must exceed 12 months.

240/80 State Prison Months x .75 = 180/15 Min. Prison Months

x 1.25 = 300/25 Max. Prison Months

TOTAL SENTENCE IMPOSED

		Months	Days
☒ State Prison ☐ Life	180		
☐ County Jail ☐ Time Served			
☐ Community Control			
☒ Probation	10		

Has more than one conviction been used at sentencing? ____ Yes ____ No

• Please designate the particular type of sentence which an enhanced or mandatory sentence imposed.

☐ Habitual Felony/Habitual Violent Offender
☐ Violent Career Criminal
☐ Mandatory pursuant to: ☐ 775.087

☐ Guideline Aggravated Departure
☐ Guideline Mitigated Departure
☐ §921.13 ☐ §921.135

JUDGE'S SIGNATURE

DISTRIBUTION:
White (Original) / Clerk
Green / DC State
Canary / State Attorney
Pink / Defense Attorney
Goldenrod / DC Offender File

000019

921.001. Sentencing Commission and sentencing guidelines generally

(1) The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature. The Legislature, in the exercise of its authority and responsibility to establish sentencing criteria, to provide for the imposition of criminal penalties, and to make the best use of state prisons so that violent criminal offenders are appropriately incarcerated, has determined that it is in the best interest of the state to develop, implement, and revise a uniform sentencing policy in cooperation with the Supreme Court. In furtherance of this cooperative effort, the Legislature created a Sentencing Commission, responsible for the initial development of a statewide system of sentencing guidelines, evaluating these guidelines periodically, and recommending on a continuing basis changes necessary to ensure incarceration of:

(a) Violent criminal offenders; and

(b) Nonviolent criminal offenders who commit repeated acts of criminal behavior and who have demonstrated an inability to comply with less restrictive penalties previously imposed for nonviolent criminal acts.

(2)(a) The commission is composed of 17 members, consisting of: 2 members of the Senate appointed by the President of the Senate; 2 members of the House of Representatives appointed by the Speaker of the House of Representatives; the Chief Justice of the Supreme Court or a member of the Supreme Court designated by the Chief Justice; 3 circuit court judges, 1 county court judge, and 1 representative of the victim advocacy profession, appointed by the Chief Justice of the Supreme Court; the Attorney General or her or his designee; and the secretary of the Department of Corrections or her or his designee. The following members are appointed by the Governor: one state attorney recommended by the Florida

Prosecuting Attorneys Association; one public defender recommended by the Public Defenders Association; one private attorney recommended by the President of The Florida Bar; and two persons of the Governor's choice. The membership of the commission shall reflect the geographic and ethnic diversity of the state. The Chief Justice or the member of the Supreme Court designated by the Chief Justice serves as chair of the commission.

(b) The members of the commission appointed by the Governor and the members from the Senate and the House of Representatives serve 2-year terms. The members appointed by the Chief Justice of the Supreme Court serve at her or his pleasure.

(c) Membership on the commission does not disqualify a member from holding any other public office or from being employed by a public entity. The Legislature finds and declares that the commission serves a state, county, and municipal purpose and that service on the commission is consistent with a member's principal service in a public office or in public employment.

(d) Members of the commission serve without compensation but are entitled to be reimbursed for per diem and travel expenses as provided for in s. 112.061.

(e) The office of the State Courts Administrator shall act as staff for the commission and shall provide all necessary data collection, analysis, and research, and support services.

(3)(a) The commission shall meet annually or at the call of the chair to review sentencing practices and recommend modifications to the guidelines. In recommending modifications to the sentencing guidelines, the commission shall take into consideration the existing sentencing and release practices and correctional resources, including the capacities of local and state correctional facilities, in addition to other relevant factors.

(b) For the purpose of assisting the commission in recommending modifications to the sentencing guidelines, the Department of Corrections is authorized to collect and evaluate data on sentencing practices in the state from each of the judicial circuits and provide technical assistance to the commission upon request. The Department of Corrections shall, no later than October 1 of each year, provide the commission with a yearly report detailing the rate of compliance of each judicial circuit in providing scoresheets to the department.

(4) The purpose of the sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decisionmaking process. The guidelines represent a synthesis of current sentencing theory, historical sentencing practices, and a rational approach to managing correctional resources. The sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-related and offender-related criteria and in defining the relative importance of those criteria in the sentencing decision. [FN1]

(a) The sentencing guidelines embody the principles that:

1. Sentencing is neutral with respect to race, gender, and social and economic status.

2. The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment.

3. The penalty imposed is commensurate with the severity of the primary offense and the circumstances surrounding the primary offense.

4. The severity of the sentence increases with the length and nature of the offender's prior record.

5. The sentence imposed by the sentencing judge reflects the length of actual time to be served, shortened only by the application of incentive and meritorious gain-time.

6. Departures from the recommended sentences established in the guidelines are articulated in writing and made only when circumstances or factors reasonably justify the aggravation or mitigation of the sentence. The level of proof necessary to establish facts that support a departure from the sentencing guidelines is a preponderance of the evidence.

7. Use of incarcerative sanctions is prioritized toward offenders convicted of serious offenses and certain offenders who have long prior records, in order to maximize the finite capacities of state and local correctional facilities.

(b)1. The guidelines enacted effective October 1, 1983, apply to all felonies, except capital felonies, committed on or after October 1, 1983, and before January 1, 1994; and to all felonies, except capital felonies and life felonies, committed before October 1, 1983, when the defendant affirmatively selects to be sentenced pursuant to such provisions.

2. The 1994 guidelines apply to sentencing for all felonies, except capital felonies, committed on or after January 1, 1994. Any revision to the 1994 guidelines applies to sentencing for all felonies, except capital felonies, committed on or after the effective date of the revision.

3. Felonies, except capital felonies, with continuing dates of enterprise shall be sentenced under the sentencing guidelines in effect on the beginning date of the criminal activity.

4. When a defendant is before the court for sentencing for more than one felony and the felonies were committed under more than one version or revision of the guidelines, each felony shall be

sentenced under the guidelines in effect at the time the particular felony was committed. This subparagraph does not apply to sentencing for any capital felony.

(c) The commission shall, no later than October 1 of each year, make a recommendation to the members of the Supreme Court, the President of the Senate, the Speaker of the House of Representatives, and the chairs of the relevant substantive committees of both houses on the need for changes in the guidelines. Upon receipt of such recommendation, the Supreme Court may revise the statewide sentencing guidelines to conform them with all or part of the commission recommendation. Such revision shall be submitted by the Supreme Court to the President of the Senate, the Speaker of the House of Representatives, and the chairs of the relevant substantive committees of both houses no later than December 1 of each year following the receipt of the recommendations of the commission. However, such revision is effective only upon the subsequent adoption by the Legislature of legislation implementing the guidelines as then revised. The court may also revise the statewide sentencing guidelines if it certifies that the revisions are necessary to conform the guidelines to previously adopted statutory revisions.

(d) The commission, with the assistance of the Department of Corrections, shall estimate how sentencing score thresholds and weights assigned to the sentencing factors will affect the rates of incarceration and the levels of prison population and shall submit to the Legislature, by October 1 of each year, recommended sentencing score thresholds, recommended weights assigned to the sentencing factors, and a recommended appropriation for state correctional resources that is sufficient to fund the estimated prison population.

(5) Sentences imposed by trial court judges under the 1994 revised sentencing guidelines on or after January 1, 1994, must be within the 1994 guidelines unless there is a departure sentence with written findings. However, a person sentenced for a felony committed on or after July 1, 1997, who has at least one prior felony

conviction and whose recommended sentence is any nonstate prison sanction may be sentenced to community control or a term of incarceration not to exceed 22 months. A person sentenced for a felony committed on or after July 1, 1997, who has at least one prior felony conviction and whose minimum recommended sentence is less than 22 months in state prison may be sentenced to a term of incarceration not to exceed 22 months. As used in this subsection, the term "conviction" means a determination of guilt which is the result of a plea or a trial, regardless of whether adjudication is withheld. Such sentence is not subject to appeal. If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, the sentence under the guidelines must be imposed, absent a departure. If a departure sentence, with written findings, is imposed, such sentence must be within any relevant maximum sentence limitations provided in s. 775.082. The failure of a trial court to impose a sentence within the sentencing guidelines is subject to appellate review pursuant to chapter 924, except as otherwise provided in this subsection. However, the extent of a departure from a guidelines sentence is not subject to appellate review.

(6) A court may impose a departure sentence outside the sentencing guidelines based upon circumstances or factors which reasonably justify the aggravation or mitigation of the sentence in accordance with s. 921.0016. The level of proof necessary to establish facts supporting a departure from a sentence under the guidelines is a preponderance of the evidence. When multiple reasons exist to support a departure from a guidelines sentence, the departure shall be upheld when at least one circumstance or factor justifies the departure regardless of the presence of other circumstances or factors found not to justify departure. Any sentence imposed outside the range recommended by the guidelines must be explained in writing by the trial court judge.

(7) A sentence may be imposed outside the guidelines based on credible facts, which may include an oral or written statement submitted by the victim or next of kin pursuant to s. 921.143, proven

by a preponderance of the evidence, which demonstrate that the victim suffered excessive physical or emotional trauma at the hands of the defendant; and such departure is not barred because victim injury has been utilized in the calculation of the guidelines sentence.

(8) A sentence may be imposed outside the guidelines based on credible facts, proven by a preponderance of the evidence, which demonstrate that the defendant's prior record, including offenses for which adjudication was withheld and the current criminal offense for which the defendant is being sentenced, indicate an escalating pattern of criminal conduct. The escalating pattern of criminal conduct may be evidenced by a progression from nonviolent to violent crimes, a progression of increasingly violent crimes, or a pattern of increasingly serious criminal activity.

(9)(a) The Sentencing Commission and the office of the State Courts Administrator shall conduct ongoing research on the impact of the sentencing guidelines, the use of imprisonment and alternatives to imprisonment, and plea bargaining. The commission, with the aid of the office of the State Courts Administrator, the Department of Corrections, and the Parole Commission, shall estimate the impact of any proposed changes to the sentencing guidelines on future rates of incarceration and levels of prison population, based in part on historical data of sentencing practices which have been accumulated by the office of the State Courts Administrator and on Department of Corrections records reflecting average time served for offenses covered by the proposed changes to the guidelines. The commission shall review the projections of impact and shall make them available to other appropriate agencies of state government, including the Legislature, by October 1 of each year.

(b) On or after January 1, 1994, any legislation which:

1. Creates a felony offense;

2. Enhances a misdemeanor offense to a felony offense;

3. Moves a felony offense from a lesser offense severity level to a higher offense severity level in the offense severity ranking chart in s. 921.0012; or

4. Reclassifies an existing felony offense to a greater felony classification must provide that such a change result in a net zero sum impact in the overall prison population, as determined by the Criminal Justice Estimating Conference, unless the legislation contains a funding source sufficient in its base or rate to accommodate such change or a provision which specifically abrogates the application of this paragraph.

(10)(a) A person who is convicted of a crime committed on or after October 1, 1983, but before January 1, 1994, may be released from incarceration only:

1. Upon expiration of the person's sentence;

2. Upon expiration of the person's sentence as reduced by accumulated gain-time;

3. As directed by an executive order granting clemency;

4. Upon attaining the provisional release date;

5. Upon placement in a conditional release program pursuant to s. 947.1405; or

6. Upon the granting of control release pursuant to s. 947.146.

(b) A person who is convicted of a crime committed on or after January 1, 1994, may be released from incarceration only:

1. Upon expiration of the person's sentence;

2. Upon expiration of the person's sentence as reduced by accumulated meritorious or incentive gain-time;

3. As directed by an executive order granting clemency;

4. Upon placement in a conditional release program pursuant to s. 947.1405 or a conditional medical release program pursuant to s. 947.149; or

5. Upon the granting of control release, including emergency control release, pursuant to s. 947.146.

(11) A person who is convicted of a crime committed on or after December 1, 1990, and who receives a control release date may not refuse to accept the terms or conditions of control release.

921.0011. Definitions

As used in this chapter, the term:

(1) "Additional offense" means any offense other than the primary offense for which an offender is convicted and that is pending before the court for sentencing at the time of the primary offense.

(2) "Conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld.

(3) "Legal status" means an offender's status if the offender:

(a) Escapes from incarceration;

(b) Flees to avoid prosecution;

(c) Fails to appear for a criminal proceeding;

(d) Violates any condition of a supersedeas bond; or

(e) Is incarcerated;

(f) Is under any form of a pretrial intervention or diversion program; or

(g) Is under any form of court-imposed or postprison release community supervision.

(4) "Primary offense" means the offense at conviction pending before the court for sentencing for which the total sentence points recommend a sanction that is as severe as, or more severe than, the sanction recommended for any other offense committed by the offender and pending before the court at sentencing. Only one count of one offense before the court for sentencing shall be classified as the primary offense.

(5) "Prior record" means a conviction for a crime committed by the offender, as an adult or a juvenile, prior to the time of the primary offense. Convictions by federal, out-of-state, military, or foreign courts, and convictions for violations of county or municipal ordinances that incorporate by reference a penalty under state law, are included in the offender's prior record. Convictions for offenses committed by the offender more than 10 years before the primary offense are not included in the offender's prior record if the offender has not been convicted of any other crime for a period of 10 consecutive years from the most recent date of release from confinement, supervision, or sanction, whichever is later, to the date of the primary offense. Juvenile dispositions of offenses committed by the offender within 3 years before the primary offense are included in the offender's prior record when the offense would have been a crime had the offender been an adult rather than a juvenile. Juvenile dispositions of sexual offenses committed by the offender which were committed 3 years or more before the primary offense are included in the offender's prior record if the offender has not maintained a conviction-free record, either as an adult or a juvenile,

for a period of 3 consecutive years from the most recent date of release from confinement, supervision, or sanction, whichever is later, to the date of the primary offense.

(6) "Community sanction" includes:

(a) Probation.

(b) Community control.

(c) Pretrial intervention or diversion.

(7)(a) "Victim injury" means the physical injury or death suffered by a person as a direct result of the primary offense, or any additional offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense.

(b) Except as provided in paragraph (c) or paragraph (d),

1. If the conviction is for an offense involving sexual contact that includes sexual penetration, the sexual penetration must be scored in accordance with the sentence points provided under s. 921.0014 for sexual penetration, regardless of whether there is evidence of any physical injury.

2. If the conviction is for an offense involving sexual contact that does not include sexual penetration, the sexual contact must be scored in accordance with the sentence points provided under s. 921.0014 for sexual contact, regardless of whether there is evidence of any physical injury.

If the victim of an offense involving sexual contact suffers any physical injury as a direct result of the primary offense or any additional offense committed by the offender resulting in conviction, such physical injury must be scored separately and in addition to the

points scored for the sexual contact or the sexual penetration.

(c) The sentence points provided under s. 921.0014 for sexual contact or sexual penetration may not be assessed for a violation of s. 944.35(3)(b)2.

(d) If the conviction is for the offense described in s. 872.06, the sentence points provided under s. 921.0014 for sexual contact or sexual penetration shall not be assessed.

921.0012. Sentencing guidelines offense levels; offense severity ranking chart

(1) The offense severity ranking chart must be used with the sentencing guidelines worksheet to compute a sentence score for each felony offender.

(2) The offense severity ranking chart has 10 offense levels, ranked from least severe to most severe, and each felony offense is assigned to a level according to the severity of the offense. For purposes of determining which felony offenses are specifically listed in the offense severity ranking chart and which severity level has been assigned to each of these offenses, the numerical statutory references in the left column of the chart and the felony degree designations in the middle column of the chart are controlling; the language in the right column of the chart is provided solely for descriptive purposes. Reclassification of the degree of the felony through the application of s. 775.0845, s. 775.087, s. 775.0875, or s. 794.023, to any offense listed in the offense severity ranking chart in this section shall not cause the offense to become unlisted and is not subject to the provisions of s. 921.0013.

(3) Offense severity ranking chart

Florida Statute	Felony Degree	Description

(a) LEVEL 1

24.118(3)(a)	3rd	Counterfeit or altered state lottery ticket.
212.054(2)(b)	3rd	Discretionary sales surtax; limitations, administration, and collection.
212.15(2)(b)	3rd	Failure to remit sales taxes, amount greater than $300 but less than $20,000.
319.30(5)	3rd	Sell, exchange, give away certificate of title or identification number plate.
319.35(1)(a)	3rd	Tamper, adjust, change, etc., an odometer.
320.26(1)(a)	3rd	Counterfeit, manufacture, or sell registration license plates or validation stickers.
322.212(1)	3rd	Possession of forged, stolen, counterfeit, or unlawfully issued driver's license; possession of simulated identification.
322.212(4)	3rd	Supply or aid in supplying unauthorized driver's license or identification card.
322.212(5)(a)	3rd	False application for driver's license or identification card.
370.13(4)(a)	3rd	Molest any stone crab trap, line, or buoy which is property of licenseholder.
370.135(1)	3rd	Molest any blue crab trap, line, or buoy which is property of licenseholder.
372.663(1)	3rd	Poach any alligator or crocodilia.
414.39(2)	3rd	Unauthorized use, possession, forgery, or alteration of food stamps, Medicaid ID, value greater than $200.

414.39(3)(a)	3rd	Fraudulent misappropriation of public assistance funds by employee/official, value more than $200.
443.071(1)	3rd	False statement or representation to obtain or increase unemployment compensation benefits.
458.327(1)(a)	3rd	Unlicensed practice of medicine.
466.026(1)(a)	3rd	Unlicensed practice of dentistry or dental hygiene.
509.151(1)	3rd	Defraud an innkeeper, food or lodging value greater than $300.
517.302(1)	3rd	Violation of the Florida Securities and Investor Protection Act.
562.27(1)	3rd	Possess still or still apparatus.
713.69	3rd	Tenant removes property upon which lien has accrued, value more than $50.
812.014(3)(c)	3rd	Petit theft (3rd conviction); theft of any property not specified in subsection (2).
812.081(2)	3rd	Unlawfully makes or causes to be made a reproduction of a trade secret.
815.04(4)(a)	3rd	Offense against intellectual property (i.e., computer programs, data).
817.52(2)	3rd	Hiring with intent to defraud, motor vehicle services.
826.01	3rd	Bigamy.
828.122(3)	3rd	Fighting or baiting animals.
831.04(1)	3rd	Any erasure, alteration, etc., of any replacement deed, map, plat, or other document listed in s. 92.28.
831.31(1)(a)	3rd	Sell, deliver, or possess counterfeit controlled substances, all but s. 893.03(5) drugs.

832.041(1)	3rd	Stopping payment with intent to defraud $150 or more.
832.05(2)(b) & (4)(c)	3rd	Knowing, making, issuing worthless checks $150 or more or obtaining property in return for worthless check $150 or more.
838.015(3)	3rd	Bribery.
838.016(1)	3rd	Public servant receiving unlawful compensation.
838.15(2)	3rd	Commercial bribe receiving.
838.16	3rd	Commercial bribery.
843.18	3rd	Fleeing by boat to elude a law enforcement officer.
847.011(1)(a)	3rd	Sell, distribute, etc., obscene, lewd, etc., material (2nd conviction).
849.01	3rd	Keeping gambling house.
849.09(1)(a)-(d)	3rd	Lottery; set up, promote, etc., or assist therein, conduct or advertise drawing for prizes, or dispose of property or money by means of lottery.
849.23	3rd	Gambling-related machines; "common offender" as to property rights.
849.25(2)	3rd	Engaging in bookmaking.
860.08	3rd	Interfere with a railroad signal.
860.13(1)(a)	3rd	Operate aircraft while under the influence.
893.13(2)(a)2.	3rd	Purchase of cannabis.
893.13(6)(a)	3rd	Possession of cannabis (more than 20 grams).
893.13(7)(a)10.	3rd	Affix false or forged label to package of controlled substance.
934.03(1)(a)	3rd	Intercepts, or procures any other person to intercept, any wire or oral communication.

(b) LEVEL 2

403.413(5)(c)	3rd	Dumps waste litter exceeding 500 lbs. in weight or 100 cubic feet in volume or any quantity for commercial purposes, or hazardous waste.
517.07	3rd	Registration of securities and furnishing of prospectus required.
590.28(1)	3rd	Willful, malicious, or intentional burning.
784.05(3)	3rd	Storing or leaving a loaded firearm within reach of minor who uses it to inflict injury or death.
787.04(1)	3rd	In violation of court order, take, entice, etc., minor beyond state limits.
806.13(1)(b)3.	3rd	Criminal mischief; damage $1,000 or more to public communication or any other public service.
810.09(2)(e)	3rd	Trespassing on posted commercial horticultural property.
812.014(2)(c)1.	3rd	Grand theft, 3rd degree; $300 or more but less than $5,000.
812.014(2)(d)	3rd	Grand theft, 3rd degree; $100 or more but less than $300, taken from unenclosed curtilage of dwelling.
817.234(1)(a)2.	3rd	False statement in support of insurance claim.
817.481(3)(a)	3rd	Obtain credit or purchase with false, expired, counterfeit, etc., credit card, value over $300.
817.52(3)	3rd	Failure to redeliver hired vehicle.
817.54	3rd	With intent to defraud, obtain mortgage note, etc., by false representation.
817.60(5)	3rd	Dealing in credit cards of another.

817.60(6)(a)	3rd	Forgery; purchase goods, services with false card.
817.61	3rd	Fraudulent use of credit cards over $100 or more within 6 months.
826.04	3rd	Knowingly marries or has sexual intercourse with person to whom related.
831.01	3rd	Forgery.
831.02	3rd	Uttering forged instrument; utters or publishes alteration with intent to defraud.
831.07	3rd	Forging bank bills or promissory note.
831.08	3rd	Possession of 10 or more forged notes.
831.09	3rd	Uttering forged bills; passes as bank bill or promissory note.
832.05(3)(a)	3rd	Cashing or depositing item with intent to defraud.
843.08	3rd	Falsely impersonating an officer.
893.13(2)(a)2.	3rd	Purchase of any s. 893.03(1)(c), (2)(c), (3), or (4) drugs other than cannabis.
893.147(2)	3rd	Manufacture or delivery of drug paraphernalia.

(c) LEVEL 3

319.30(4)	3rd	Possession by junkyard of motor vehicle with identification number plate removed.
319.33(1)(a)	3rd	Alter or forge any certificate of title to a motor vehicle or mobile home.
319.33(1)(c)	3rd	Procure or pass title on stolen vehicle.
319.33(4)	3rd	With intent to defraud, possess, sell, etc., a blank, forged, or

		unlawfully obtained title or registration.
328.05(2)	3rd	Possess, sell, or counterfeit fictitious, stolen, or fraudulent titles or bills of sale of vessels.
328.07(4)	3rd	Manufacture, exchange, or possess vessel with counterfeit or wrong ID number.
376.302(5)	3rd	Fraud related to reimbursement for cleanup expenses under the Inland Protection Trust Fund.
501.001(2)(b)	2nd	Tampers with a consumer product or the container using materially false/misleading information.
697.08	3rd	Equity skimming.
790.15(3)	3rd	Person directs another to discharge firearm from a vehicle.
796.05(1)	3rd	Live on earnings of a prostitute.
806.10(1)	3rd	Maliciously injure, destroy, or interfere with vehicles or equipment used in firefighting.
806.10(2)	3rd	Interferes with or assaults firefighter in performance of duty.
810.09(2)(c)	3rd	Trespass on property other than structure or conveyance armed with firearm or dangerous weapon.
812.014(2)(c)2.	3rd	Grand theft; $5,000 or more but less than $10,000.
815.04(4)(b)	2nd	Computer offense devised to defraud or obtain property.
817.034(4)(a)3.	3rd	Engages in scheme to defraud (Florida Communications Fraud Act), property valued at less than $20,000.
817.233	3rd	Burning to defraud insurer.
828.12(2)	3rd	Tortures any animal with intent to inflict intense pain, serious

		physical injury, or death.
831.29	2nd	Possession of instruments for counterfeiting driver's licenses or identification cards.
838.021(3)(b)	3rd	Threatens unlawful harm to public servant.
843.19	3rd	Injure, disable, or kill police dog or horse.
870.01(2)	3rd	Riot; inciting or encouraging.
893.13(1)(a)2.	3rd	Sell, manufacture, or deliver cannabis (or other s. 893.03(1)(c), (2)(c), (3), or (4) drugs).
893.13(1)(d)2.	2nd	Sell, manufacture, or deliver s. 893.03(1)(c), (2)(c), (3), or (4) drugs within 200 feet of university, public housing facility, or public park.
893.13(6)(a)	3rd	Possession of any controlled substance other than felony possession of cannabis.
893.13(7)(a)9.	3rd	Obtain or attempt to obtain controlled substance by fraud, forgery, misrepresentation, etc.
893.13(7)(a)11.	3rd	Furnish false or fraudulent material information on any document or record required by chapter 893.
918.13(1)(a)	3rd	Alter, destroy, or conceal investigation evidence.
944.401	3rd	Escapes from juvenile facility (secure detention or residential commitment facility).
944.47(1)(a)1.-2.	3rd	Introduce contraband to correctional facility.
944.47(1)(c)	2nd	Possess contraband while upon the grounds of a correctional institution.

(d) LEVEL 4

316.1935(2)	3rd	Fleeing or attempting to elude law enforcement officer resulting in high-speed pursuit.
784.07(2)(b)	3rd	Battery of law enforcement officer, firefighter, intake officer, etc.
784.075	3rd	Battery on detention or commitment facility staff.
784.08(2)(c)	3rd	Battery on a person 65 years of age or older.
784.081(3)	3rd	Battery on specified official or employee.
784.082(3)	3rd	Battery by detained person on visitor or other detainee.
787.03(1)	3rd	Interference with custody; wrongly takes child from appointed guardian.
787.04(2)	3rd	Take, entice, or remove child beyond state limits with criminal intent pending custody proceedings.
787.04(3)	3rd	Carrying child beyond state lines with criminal intent to avoid producing child at custody hearing or delivering to designated person.
790.115(1)	3rd	Exhibiting firearm or weapon within 1,000 feet of a school.
790.115(2)(b)	3rd	Possessing electric weapon or device, destructive device, or other weapon on school property.
790.115(2)(c)	3rd	Possessing firearm on school property.
810.02(4)(a)	3rd	Burglary, or attempted burglary, of an unoccupied structure; unarmed; no assault or battery.
810.02(4)(b)	3rd	Burglary, or attempted burglary, of an unoccupied conveyance;

		unarmed; no assault or battery.
810.06	3rd	Burglary; possession of tools.
810.08(2)(c)	3rd	Trespass on property, armed with firearm or dangerous weapon.
812.014(2)(c)3.	3rd	Grand theft, 3rd degree $10,000 or more but less than $20,000.
812.014(2)(c)4.-10.	3rd	Grand theft, 3rd degree, a will, firearm, motor vehicle, livestock, etc.
817.563(1)	3rd	Sell or deliver substance other than controlled substance agreed upon, excluding s. 893.03(5) drugs.
828.125(1)	2nd	Kill, maim, or cause great bodily harm or permanent breeding disability to any registered horse or cattle.
837.02(1)	3rd	Perjury in official proceedings.
837.021(1)	3rd	Make contradictory statements in official proceedings.
843.025	3rd	Deprive law enforcement, correctional, or correctional probation officer of means of protection or communication.
843.15(1)(a)	3rd	Failure to appear while on bail for felony (bond estreature or bond jumping).
874.05(1)	3rd	Encouraging or recruiting another to join a criminal street gang.
893.13(2)(a)1.	2nd	Purchase of cocaine (or other s. 893.03(1)(a), (b), or (d), or (2)(a) or (b) drugs).
914.14(2)	3rd	Witnesses accepting bribes.
914.22(1)	3rd	Force, threaten, etc., witness, victim, or informant.
914.23(2)	3rd	Retaliation against a witness, victim, or informant, no bodily injury.

918.12	3rd	Tampering with jurors.

(e) LEVEL 5

316.027(1)(a)	3rd	Accidents involving personal injuries, failure to stop; leaving scene.
316.1935(3)	3rd	Aggravated fleeing or eluding.
322.34(3)	3rd	Careless operation of motor vehicle with suspended license, resulting in death or serious bodily injury.
327.30(5)	3rd	Vessel accidents involving personal injury; leaving scene.
381.0041(11)(b)	3rd	Donate blood, plasma, or organs knowing HIV positive.
790.01(2)	3rd	Carrying a concealed firearm.
790.162	2nd	Threat to throw or discharge destructive device.
790.163	2nd	False report of deadly explosive.
790.165(2)	3rd	Manufacture, sell, possess, or deliver hoax bomb.
790.221(1)	2nd	Possession of short-barreled shotgun or machine gun.
790.23	2nd	Felons in possession of firearms or electronic weapons or devices.
806.111(1)	3rd	Possess, manufacture, or dispense fire bomb with intent to damage any structure or property.
812.019(1)	2nd	Stolen property; dealing in or trafficking in.
812.16(2)	3rd	Owning, operating, or conducting a chop shop.
817.034(4)(a)2.	2nd	Communications fraud, value $20,000 to $50,000.
825.1025(4)	3rd	Lewd or lascivious exhibition in the presence of an elderly person or disabled adult.
827.071(4)	2nd	Possess with intent to promote any

		photographic material, motion picture, etc., which includes sexual conduct by a child.
843.01	3rd	Resist officer with violence to person; resist arrest with violence.
874.05(2)	2nd	Encouraging or recruiting another to join a criminal street gang; second or subsequent offense.
893.13(1)(a)1.	2nd	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) drugs).
893.13(1)(c)2.	2nd	Sell, manufacture, or deliver cannabis (or other s. 893.03(1)(c), (2)(c), (3), or (4) drugs) within 1,000 feet of a child care facility or school.
893.13(1)(d)1.	1st	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) drugs) within 200 feet of university, public housing facility, or public park.
893.13(1)(e)	2nd	Sell, manufacture, or deliver cannabis (or other s. 893.03(1)(c), (2)(c), (3), or (4) drugs) within 1,000 feet of property used for religious services or a specified business site.
893.13(4)(b)	2nd	Deliver to minor cannabis (or other s. 893.03(1)(c), (2)(c), (3), or (4) drugs).

(f) LEVEL 6

316.027(1)(b)	2nd	Accident involving death, failure to stop; leaving scene.
316.193(2)(b)	3rd	Felony DUI, 4th or subsequent

		conviction.
775.0875(1)	3rd	Taking firearm from law enforcement officer.
775.21(9)	3rd	Failure to register; failure to renew driver's license or identification card.
784.021(1)(a)	3rd	Aggravated assault; deadly weapon without intent to kill.
784.021(1)(b)	3rd	Aggravated assault; intent to commit felony.
784.041	3rd	Felony battery.
784.048(3)	3rd	Aggravated stalking; credible threat.
784.048(5)	3rd	Aggravated stalking of person under 16.
784.07(2)(c)	2nd	Aggravated assault on law enforcement officer.
784.08(2)(b)	2nd	Aggravated assault on a person 65 years of age or older.
784.081(2)	2nd	Aggravated assault on specified official or employee.
784.082(2)	2nd	Aggravated assault by detained person on visitor or other detainee.
787.02(2)	3rd	False imprisonment; restraining with purpose other than those in s. 787.01.
790.115(2)(d)	2nd	Discharging firearm or weapon on school property.
790.161(2)	2nd	Make, possess, or throw destructive device with intent to do bodily harm or damage property.
790.164(1)	2nd	False report of deadly explosive or act of arson or violence to state property.
790.19	2nd	Shooting or throwing deadly missiles into dwellings, vessels, or vehicles.

794.011(8)(a)	3rd	Solicitation of minor to participate in sexual activity by custodial adult.
794.05(1)	2nd	Unlawful sexual activity with specified minor.
806.031(2)	2nd	Arson resulting in great bodily harm to firefighter or any other person.
810.02(3)(c)	2nd	Burglary of occupied structure; unarmed; no assault or battery.
812.014(2)(b)	2nd	Property stolen $20,000 or more, but less than $100,000, grand theft in 2nd degree.
812.13(2)(c)	2nd	Robbery, no firearm or other weapon (strong-arm robbery).
817.034(4)(a)1.	1st	Communications fraud, value greater than $50,000.
817.4821(5)	2nd	Possess cloning paraphernalia with intent to create cloned cellular telephones.
825.102(1)	3rd	Abuse of an elderly person or disabled adult.
825.102(3)(c)	3rd	Neglect of an elderly person or disabled adult.
825.1025(3)	3rd	Lewd or lascivious molestation of an elderly person or disabled adult.
825.103(2)(c)	3rd	Exploiting an elderly person or disabled adult and property is valued at less than $20,000.
827.03(1)	3rd	Abuse of a child.
827.03(3)(c)	3rd	Neglect of a child.
827.071(2)&(3)	2nd	Use or induce a child in a sexual performance, or promote or direct such performance.
836.05	2nd	Threats; extortion.
836.10	2nd	Written threats to kill or do bodily injury.

843.12	3rd	Aids or assists person to escape.
914.23	2nd	Retaliation against a witness, victim, or informant, with bodily injury.
943.0435(6)	3rd	Sex offenders; failure to comply with reporting requirements.
944.35(3)(a)2.	3rd	Committing malicious battery upon or inflicting cruel or inhuman treatment on an inmate or offender on community supervision, resulting in great bodily harm.
944.40	2nd	Escapes.
944.46	3rd	Harboring, concealing, aiding escaped prisoners.
944.47(1)(a)5.	2nd	Introduction of contraband (firearm, weapon, or explosive) into correctional facility.
951.22(1)	3rd	Intoxicating drug, firearm, or weapon introduced into county facility.

(g) LEVEL 7

316.193(3)(c)2.	3rd	DUI resulting in serious bodily injury.
327.35(3)(c)2.	3rd	Vessel BUI resulting in serious bodily injury.
409.920(2)	3rd	Medicaid provider fraud.
494.0018(2)	1st	Conviction of any violation of ss. 494.001-494.0077 in which the total money and property unlawfully obtained exceeded $50,000 and there were five or more victims.
782.07(1)	2nd	Killing of a human being by the act, procurement, or culpable negligence of another (manslaughter).

782.071(1)	3rd	Killing of human being by the operation of a motor vehicle in a reckless manner (vehicular homicide).
782.072(1)	3rd	Killing of a human being by the operation of a vessel in a reckless manner (vessel homicide).
784.045(1)(a)1.	2nd	Aggravated battery; intentionally causing great bodily harm or disfigurement.
784.045(1)(a)2.	2nd	Aggravated battery; using deadly weapon.
784.045(1)(b)	2nd	Aggravated battery; perpetrator aware victim pregnant.
784.048(4)	3rd	Aggravated stalking; violation of injunction or court order.
784.07(2)(d)	1st	Aggravated battery on law enforcement officer.
784.08(2)(a)	1st	Aggravated battery on a person 65 years of age or older.
784.081(1)	1st	Aggravated battery on specified official or employee.
784.082(1)	1st	Aggravated battery by detained person on visitor or other detainee.
790.07(4)	1st	Specified weapons violation subsequent to previous conviction of s. 790.07(1) or (2).
790.16(1)	1st	Discharge of a machine gun under specified circumstances.
796.03	2nd	Procuring any person under 16 years for prostitution.
800.04	2nd	Handle, fondle, or assault child under 16 years in lewd, lascivious, or indecent manner.
806.01(2)	2nd	Maliciously damage structure by fire or explosive.
810.02(3)(a)	2nd	Burglary of occupied dwelling;

		unarmed; no assault or battery.
810.02(3)(b)	2nd	Burglary of unoccupied dwelling; unarmed; no assault or battery.
810.02(3)(d)	2nd	Burglary of occupied conveyance; unarmed; no assault or battery.
812.014(2)(a)	1st	Property stolen, valued at $100,000 or more; property stolen while causing other property damage; 1st degree grand theft.
812.019(2)	1st	Stolen property; initiates, organizes, plans, etc., the theft of property and traffics in stolen property.
812.133(2)(b)	1st	Carjacking; no firearm, deadly weapon, or other weapon.
825.102(3)(b)	2nd	Neglecting an elderly person or disabled adult causing great bodily harm, disability, or disfigurement.
825.1025(2)	2nd	Lewd or lascivious battery upon an elderly person or disabled adult.
825.103(2)(b)	2nd	Exploiting an elderly person or disabled adult and property is valued at $20,000 or more, but less than $100,000.
827.03(3)(b)	2nd	Neglect of a child causing great bodily harm, disability, or disfigurement.
827.04(4)	3rd	Impregnation of a child under 16 years of age by person 21 years of age or older.
837.05(2)	3rd	Giving false information about alleged capital felony to a law enforcement officer.
872.06	2nd	Abuse of a dead human body.
893.13(1)(c)1.	1st	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b)

		drugs) within 1,000 feet of a child care facility or school.
893.13(1)(e)	1st	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) drugs) within 1,000 feet of property used for religious services or a specified business site.
893.13(4)(a)	1st	Deliver to minor cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) drugs).
893.135(1)(a)1.	1st	Trafficking in cannabis, more than 50 lbs., less than 2,000 lbs.
893.135(1)(b)1.a.	1st	Trafficking in cocaine, more than 28 grams, less than 200 grams.
893.135(1)(c)1.a.	1st	Trafficking in illegal drugs, more than 4 grams, less than 14 grams.
893.135(1)(d)1.	1st	Trafficking in phencyclidine, more than 28 grams, less than 200 grams.
893.135(1)(e)1.	1st	Trafficking in methaqualone, more than 200 grams, less than 5 kilograms.
893.135(1)(f)1.	1st	Trafficking in amphetamine, more than 14 grams, less than 28 grams.
893.135(1)(g)1.a.	1st	Trafficking in flunitrazepam, 4 grams or more, less than 14 grams.

(h) LEVEL 8

316.193(3)(c)3.a.	2nd	DUI manslaughter.
327.35(3)(c)3.	2nd	Vessel BUI manslaughter.
777.03(2)(a)	1st	Accessory after the fact, capital felony.
782.04(4)	2nd	Killing of human without design when engaged in act or attempt of any felony other than arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or

		unlawfully discharging bomb.
782.071(2)	2nd	Committing vehicular homicide and failing to render aid or give information.
782.072(2)	2nd	Committing vessel homicide and failing to render aid or give information.
790.161(3)	1st	Discharging a destructive device which results in bodily harm or property damage.
794.011(5)	2nd	Sexual battery, victim 12 years or over, offender does not use physical force likely to cause serious injury.
806.01(1)	1st	Maliciously damage dwelling or structure by fire or explosive, believing person in structure.
810.02(2)(a)	1st,PBL	Burglary with assault or battery.
810.02(2)(b)	1st,PBL	Burglary; armed with explosives or dangerous weapon.
810.02(2)(c)	1st	Burglary of a dwelling or structure causing structural damage or $1,000 or more property damage.
812.13(2)(b)	1st	Robbery with a weapon.
812.135(2)	1st	Home-invasion robbery.
825.102(2)	2nd	Aggravated abuse of an elderly person or disabled adult.
825.103(2)(a)	1st	Exploiting an elderly person or disabled adult and property is valued at $100,000 or more.
827.03(2)	2nd	Aggravated child abuse.
837.02(2)	2nd	Perjury in official proceedings relating to prosecution of capital felony.
837.021(2)	2nd	Making contradictory statements in official proceedings relating to prosecution of capital felony.

860.121(2)(c)	1st	Shooting at or throwing any object in path of railroad vehicle resulting in great bodily harm.
860.16	1st	Aircraft piracy.
893.13(1)(b)	1st	Sell or deliver in excess of 10 grams of any substance specified in s. 893.03(1)(a) or (b).
893.13(2)(b)	1st	Purchase in excess of 10 grams of any substance specified in s. 893.03(1)(a) or (b).
893.13(6)(c)	1st	Possess in excess of 10 grams of any substance specified in s. 893.03(1)(a) or (b).
893.135(1)(a)2.	1st	Trafficking in cannabis, more than 2,000 lbs., less than 10,000 lbs.
893.135(1)(b)1.b.	1st	Trafficking in cocaine, more than 200 grams, less than 400 grams.
893.135(1)(c)1.b.	1st	Trafficking in illegal drugs, more than 14 grams, less than 28 grams.
893.135(1)(d)2.	1st	Trafficking in phencyclidine, more than 200 grams, less than 400 grams.
893.135(1)(e)2.	1st	Trafficking in methaqualone, more than 5 kilograms, less than 25 kilograms.
893.135(1)(f)2.	1st	Trafficking in amphetamine, more than 28 grams, less than 200 grams.
893.135(1)(g)1.b.	1st	Trafficking in flunitrazepam, 14 grams or more, less than 28 grams.
895.03(1)	1st	Use or invest proceeds derived from pattern of racketeering activity.
895.03(2)	1st	Acquire or maintain through racketeering activity any interest in or control of any enterprise or real property.
895.03(3)	1st	Conduct or participate in any

		enterprise through pattern of racketeering activity.
	(i) LEVEL 9	
316.193(3)(c)3.b.	1st	DUI manslaughter; failing to render aid or give information.
782.04(1)	1st	Attempt, conspire, or solicit to commit premeditated murder.
782.04(3)	1st,PBL	Accomplice to murder in connection with arson, sexual battery, robbery, burglary, and other specified felonies.
782.07(2)	1st	Aggravated manslaughter of an elderly person or disabled adult.
782.07(3)	1st	Aggravated manslaughter of a child.
787.01(1)(a)1.	1st,PBL	Kidnapping; hold for ransom or reward or as a shield or hostage.
787.01(1)(a)2.	1st,PBL	Kidnapping with intent to commit or facilitate commission of any felony.
787.01(1)(a)4.	1st,PBL	Kidnapping with intent to interfere with performance of any governmental or political function.
787.02(3)(a)	1st	False imprisonment; child under age 13; perpetrator also commits child abuse, sexual battery, lewd, or lascivious act, etc.
790.161	1st	Attempted capital destructive device offense.
794.011(2)	1st	Attempted sexual battery; victim less than 12 years of age.
794.011(2)	Life	Sexual battery; offender younger than 18 years and commits sexual battery on a person less than 12 years.
794.011(4)	1st	Sexual battery; victim 12 years or

		older, certain circumstances.
794.011(8)(b)	1st	Sexual battery; engage in sexual conduct with minor 12 to 18 years by person in familial or custodial authority.
812.13(2)(a)	1st,PBL	Robbery with firearm or other deadly weapon.
812.133(2)(a)	1st,PBL	Carjacking; firearm or other deadly weapon.
847.0145(1)	1st	Selling, or otherwise transferring custody or control, of a minor.
847.0145(2)	1st	Purchasing, or otherwise obtaining custody or control, of a minor.
859.01	1st	Poisoning food, drink, medicine, or water with intent to kill or injure another person.
893.135	1st	Attempted capital trafficking offense.
893.135(1)(a)3.	1st	Trafficking in cannabis, more than 10,000 lbs.
893.135(1)(b)1.c.	1st	Trafficking in cocaine, more than 400 grams, less than 150 kilograms.
893.135(1)(c)1.c.	1st	Trafficking in illegal drugs, more than 28 grams, less than 30 kilograms.
893.135(1)(d)3.	1st	Trafficking in phencyclidine, more than 400 grams.
893.135(1)(e)3.	1st	Trafficking in methaqualone, more than 25 kilograms.
893.135(1)(f)3.	1st	Trafficking in amphetamine, more than 200 grams.
	(j) LEVEL 10	
782.04(2)	1st,PBL	Unlawful killing of human; act is homicide, unpremeditated.
787.01(1)(a)3.	1st,PBL	Kidnapping; inflict bodily harm

		upon or terrorize victim.
787.01(3)(a)	Life	Kidnapping; child under age 13, perpetrator also commits child abuse, sexual battery, lewd, or lascivious act, etc.
794.011(3)	Life	Sexual battery; victim 12 years or older, offender uses or threatens to use deadly weapon or physical force to cause serious injury.
876.32	1st	Treason against the state.

921.0013. Sentencing guidelines; ranking unlisted felony offenses

A felony offense not listed in s. 921.0012 is ranked with respect to offense severity level by the Legislature, commensurate with the harm or potential harm that is caused by the offense to the community. Until the Legislature specifically assigns an offense to a severity level in the offense severity ranking chart, the severity level is within the following parameters:

(1) A felony of the third degree within offense level 1.

(2) A felony of the second degree within offense level 4.

(3) A felony of the first degree within offense level 7.

(4) A felony of the first degree punishable by life within offense level 9.

(5) A life felony within offense level 10.

For purposes of determining whether a felony offense has been specifically listed in the offense ranking chart provided in s. 921.0012(3), and the severity level that has been assigned to an offense listed in the chart, the numerical statutory reference in the left column of the chart, and the felony degree designation in the middle column of the chart, are controlling; the language in the right

column of the chart is provided solely for descriptive purposes.

921.0014. Sentencing guidelines; worksheet computations; scoresheets

(1)(a) The sentencing guidelines worksheet is used to compute the subtotal and total sentence points as follows:

FLORIDA SENTENCING GUIDELINES WORKSHEET

OFFENSE SCORE

Primary Offense

Level	Sentence Points		Total
10	116	=	_____
9	92	=	_____
8	74	=	_____
7	56	=	_____
6	36	=	_____
5	28	=	_____
4	22	=	_____
3	16	=	_____
2	10	=	_____
1	4	=	_____

Total

_____

Additional Offenses

Level	Sentence Points		Counts		Total
10	58	x	_____	=	_____
9	46	x	_____	=	_____
8	37	x	_____	=	_____
7	28	x	_____	=	_____

6	18	x	_____	=	_____
5	5:4	x	_____	=	_____
4	3.6	x	_____	=	_____
3	2.4	x	_____	=	_____
2	1.2	x	_____	=	_____
1	0.7	x	_____	=	_____
M	0.2	x	_____	=	_____

Total

_____

Level	Victim Injury Sentence Points		Number		Total
2nd degree murder-death	240	x	_____	=	_____
Death	120	x	_____	=	_____
Severe	40	x	_____	=	_____
Sexual penetration	80	x	_____	=	_____
Moderate	18	x	_____	=	_____
Sexual contact	40	x	_____	=	_____
Slight	4	x	_____	=	_____

Total

_____

Primary Offense + Additional Offenses + Victim Injury =

TOTAL OFFENSE SCORE

PRIOR RECORD SCORE

Level	Prior Record Sentence Points		Number		Total
10	29	x	_____	=	_____
9	23	x	_____	=	_____
8	19	x	_____	=	_____
7	14	x	_____	=	_____
6	9	x	_____	=	_____
5	3.6	x	_____	=	_____
4	2.4	x	_____	=	_____
3	1.6	x	_____	=	_____
2	0.8	x	_____	=	_____
1	0.5	x	_____	=	_____
M	0.2	x	_____	=	_____

Total

TOTAL OFFENSE SCORE

_____

TOTAL PRIOR RECORD SCORE

_____

LEGAL STATUS

_____

COMMUNITY SANCTION VIOLATION

_____

PRIOR SERIOUS FELONY

_____

PRIOR CAPITAL FELONY

_____

FIREARM OR SEMIAUTOMATIC WEAPON

_____

SUBTOTAL _____

VIOLENT CAREER CRIMINAL (no)(yes)

VIOLENT HABITUAL OFFENDER (no)(yes)

HABITUAL OFFENDER (no)(yes)

DRUG TRAFFICKER (no)(yes) (x multiplier)

LAW ENF. PROTECT. (no)(yes) (x multiplier)

MOTOR VEHICLE THEFT (no)(yes) (x multiplier)

CRIMINAL STREET GANG MEMBER (no)(yes) (x multiplier)

TOTAL SENTENCE POINTS _____

(b) WORKSHEET KEY:

Legal status points are assessed when any form of legal status existed at the time the offender committed an offense before the court for sentencing. Four (4) sentence points are assessed for an offender's legal status.

Community sanction violation points are assessed when a community sanction violation is before the court for sentencing. Six (6) sentence points are assessed for each community sanction violation, and each successive community sanction violation; however, if the community sanction violation includes a new felony conviction before the sentencing court, twelve (12) community sanction violation points are assessed for such violation, and for each successive community sanction violation involving a new felony conviction. Multiple counts of community sanction violations before the sentencing court shall not be a basis for multiplying the assessment of community sanction violation points.

Prior serious felony points: If the offender has a primary

offense or any additional offense ranked in level 8, level 9, or level 10, and one or more prior serious felonies, a single assessment of 30 points shall be added. For purposes of this section, a prior serious felony is an offense in the offender's prior record that is ranked in level 8, level 9, or level 10 under s. 921.0012 or s. 921.0013 and for which the offender is serving a sentence of confinement, supervision, or other sanction or for which the offender's date of release from confinement, supervision, or other sanction, whichever is later, is within 3 years before the date the primary offense or any additional offense was committed.

Prior capital felony points: If the offender has one or more prior capital felonies, points shall be added to the subtotal sentence points of the offender equal to twice the number of points the offender receives for the primary offense and any additional offense. A prior capital felony is a capital felony offense for which the offender has been found guilty; or a felony in another jurisdiction which is a capital felony in that jurisdiction, or would be a capital felony if the offense were committed in this state.

Possession of a firearm, semiautomatic firearm, or machine gun: If the offender is convicted of committing or attempting to commit any felony other than those enumerated in s. 775.087(2) while having in his or her possession: a firearm as defined in s. 790.001(6), an additional 18 sentence points are assessed; or if the offender is convicted of committing or attempting to commit any felony other than those enumerated in s. 775.087(3) while having in his or her possession a semiautomatic firearm as defined in s. 775.087(3) or a machine gun as defined in s. 790.001(9), an additional 25 sentence points are assessed.

Sentencing multipliers:

Drug trafficking: If the primary offense is drug trafficking under s. 893.135, the subtotal sentence points are multiplied, at the discretion of the court, for a level 7 or level 8 offense, by 1.5. The state attorney may move the sentencing court to reduce or suspend

the sentence of a person convicted of a level 7 or level 8 offense, if the offender provides substantial assistance as described in s. 893.135(4).

Law enforcement protection: If the primary offense is a violation of the Law Enforcement Protection Act under s. 775.0823(2), the subtotal sentence points are multiplied by 2.5. If the primary offense is a violation of s. 775.0823(3), (4), (5), (6), (7), or (8), the subtotal sentence points are multiplied by 2.0. If the primary offense is a violation of s. 784.07(3) or s. 775.0875(1), or of the Law Enforcement Protection Act under s. 775.0823(9) or (10), the subtotal sentence points are multiplied by 1.5.

Grand theft of a motor vehicle: If the primary offense is grand theft of the third degree involving a motor vehicle and in the offender's prior record, there are three or more grand thefts of the third degree involving a motor vehicle, the subtotal sentence points are multiplied by 1.5.

Domestic violence in the presence of a child: If the offender is convicted of the primary offense and that offense is determined to be a crime of domestic violence as defined in s. 741.28 and to have been committed in the presence of a child who is related by blood or marriage to the victim or perpetrator and who is under the age of 16, the subtotal sentence points are multiplied, at the discretion of the court, by 1.5.

Criminal street gang member: If the offender is convicted of the primary offense and is found to have been a member of a criminal street gang at the time of the commission of the primary offense pursuant to s. 874.04, the subtotal sentence points are multiplied by 1.5.

(2) Recommended sentences:

If the total sentence points are less than or equal to 40, the recommended sentence shall not be a state prison sentence; however,

the court, in its discretion, may increase the total sentence points by up to, and including, 15 percent.

If the total sentence points are greater than 40 and less than or equal to 52, the decision to incarcerate in a state prison is left to the discretion of the court.

If the total sentence points are greater than 52, the sentence must be a state prison sentence calculated by total sentence points. A state prison sentence is calculated as follows:

State prison months = total sentence points minus 28.

The recommended sentence length in state prison months may be increased by up to, and including, 25 percent or decreased by up to, and including, 25 percent, at the discretion of the court. The recommended sentence length may not be increased if the total sentence points have been increased for that offense by up to, and including, 15 percent. If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, the sentence recommended under the guidelines must be imposed absent a departure.

If the total sentence points are equal to or greater than 363, the court may sentence the offender to life imprisonment. An offender sentenced to life imprisonment under this section is not eligible for any form of discretionary early release, except pardon, executive clemency, or conditional medical release under s. 947.149.

(3) A single guidelines scoresheet shall be prepared for each defendant, except that if the defendant is before the court for sentencing for more than one felony and the felonies were committed under more than one version or revision of the guidelines, separate scoresheets must be prepared pursuant to s. 921.001(4)(b). The scoresheet or scoresheets must cover all the defendant's offenses pending before the court for sentencing. Either the office of the state attorney or the Department of Corrections, or both where

appropriate, shall prepare the scoresheet or scoresheets, which must be presented to the defense counsel for review for accuracy in all cases unless the judge directs otherwise. The defendant's scoresheet or scoresheets must be approved and signed by the sentencing judge.

(4) The clerk of the circuit court shall transmit a complete, accurate, and legible copy of the guidelines scoresheet utilized in each guidelines sentencing proceeding to the Department of Corrections. Scoresheets must be transmitted no less frequently than monthly, by the first of each month, and may be sent collectively.

(5) A copy of the individual offender's sentencing guidelines scoresheet and any attachments thereto prepared pursuant to Rule 3.701, Florida Rules of Criminal Procedure, must be attached to the copy of the uniform judgment and sentence form provided to the Department of Corrections.

921.0015. Adoption and implementation of revised sentencing guidelines

(1) Rules 3.701 and 3.988, Florida Rules of Criminal Procedure, as revised by the Florida Supreme Court on April 21, 1988, are hereby adopted and implemented in accordance with s. 921.001.

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921.0016. Recommended sentences; departure sentences; aggravating and mitigating circumstances

(1)(a) The recommended guidelines sentence provided by the total sentence points is assumed to be appropriate for the offender.

(b) A trial court judge may impose a state prison sentence which varies upward or downward by up to, and including, 25 percent from the recommended guidelines state prison sentence without issuing a written statement delineating the reasons for the variation.

(c) A state prison sentence which varies upward or downward from the recommended guidelines prison sentence by more than 25 percent is a departure sentence and must be accompanied by a written statement delineating the reasons for the departure, filed within 7 days after the date of sentencing. A written transcription of orally stated reasons for departure from the guidelines at sentencing is permissible if it is filed by the court within 7 days after the date of sentencing.

(d) The imposition of a split sentence of incarceration followed by community control or probation does not by itself constitute a departure from sentencing guidelines. For the purpose of determining the maximum sentence authorized by law, any community control portion of a split sentence does not constitute a term of imprisonment.

(e) A departure sentence must be within any relevant maximum sentence limitations provided by s. 775.082.

(2) A departure from the recommended guidelines sentence is discouraged unless there are circumstances or factors which

reasonably justify the departure. Aggravating and mitigating factors to be considered include, but are not limited to, those listed in subsections (3) and (4). The failure of a trial court to impose a sentence within the sentencing guidelines is subject to appellate review under chapter 924, but the extent of departure from a guidelines sentence is not subject to appellate review.

(3) Aggravating circumstances under which a departure from the sentencing guidelines is reasonably justified include, but are not limited to:

(a) The departure results from a legitimate, uncoerced plea bargain.

(b) The offense was one of violence and was committed in a manner that was especially heinous, atrocious, or cruel.

(c) The offenses before the court for sentencing arose out of separate episodes; the primary offense is scored at offense level 4 or higher; and the defendant has committed five or more offenses within a 180-day period that have resulted in convictions.

(d) The primary offense is scored at offense level 3 and the defendant has committed eight or more offenses within a 180-day period that have resulted in convictions.

(e) The offense before the court for disposition was committed within 6 months after the defendant was discharged from a release program, as defined in s. 921.0011(6), [FN1] or released from state prison, whichever is later.

(f) The defendant occupied a leadership role in a criminal organization.

(g) The offense was committed by a public official under color of office.

(h) The defendant knew the victim was a law enforcement officer at the time of the offense; the offense was a violent offense; and that status is not an element of the primary offense.

(i) The offense created a substantial risk of death or great bodily harm to many persons or to one or more small children.

(j) The victim was especially vulnerable due to age or physical or mental disability.

(k) The offense was motivated by prejudice based on race, color, ancestry, ethnicity, religion, sexual orientation, or national origin of the victim.

(l) The victim suffered extraordinary physical or emotional trauma or permanent physical injury, or was treated with particular cruelty.

(m) The victim was physically attacked by the defendant in the presence of one or more members of the victim's family.

(n) The offense resulted in substantial economic hardship to a victim and consisted of an illegal act or acts committed by means of concealment, guile, or fraud to obtain money or property, to avoid payment or loss of money or property, or to obtain business or professional advantage, when two or more of the following circumstances were present:

1. The offense involved multiple victims or multiple incidents per victim;

2. The offense involved a high degree of sophistication or planning or occurred over a lengthy period of time;

3. The defendant used position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationship; or

4. The defendant was in the past involved in other conduct similar to that involved in the current offense.

(o) The offense was committed in order to prevent or avoid arrest, to impede or prevent prosecution for the conduct underlying the offense, or to effect an escape from custody.

(p) The defendant is not amenable to rehabilitation or supervision, as evidenced by an escalating pattern of criminal conduct as described in s. 921.001(8).

(q) The defendant induced a minor to participate in any of the offenses pending before the court for disposition.

(r) The primary offense is scored at offense level 7 or higher and the defendant has been convicted of one more offense that scored, or would have scored, at an offense level 8 or higher.

(s) The defendant has an extensive unscoreable juvenile record.

(t) The defendant committed an offense involving sexual contact or sexual penetration and as a direct result of the offense, the victim contracted a sexually transmissible disease.

(4) Mitigating circumstances under which a departure from the sentencing guidelines is reasonably justified include, but are not limited to:

(a) The departure results from a legitimate, uncoerced plea bargain.

(b) The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct.

(c) The capacity of the defendant to appreciate the criminal

nature of the conduct or to conform that conduct to the requirements of law was substantially impaired.

(d) The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment.

(e) The need for payment of restitution to the victim outweighs the need for a prison sentence.

(f) The victim was an initiator, willing participant, aggressor, or provoker of the incident.

(g) The defendant acted under extreme duress or under the domination of another person.

(h) Before the identity of the defendant was determined, the victim was substantially compensated.

(i) The defendant cooperated with the state to resolve the current offense or any other offense.

(j) The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.

(k) At the time of the offense the defendant was too young to appreciate the consequences of the offense.

(l) The defendant is to be sentenced as a youthful offender.

(5) A defendant's substance abuse or addiction, including intoxication at the time of the offense, is not a mitigating factor under subsection (4) and does not, under any circumstances, justify a downward departure from the sentence recommended under the sentencing guidelines.

921.0017. Credit upon recommitment of offender serving split sentence

Effective for offenses committed on or after January 1, 1994, if an offender's probation or community control is revoked and the offender is serving a split sentence pursuant to s. 948.012, upon recommitment to the Department of Corrections, the court shall order credit for time served in state prison or county jail only, without considering any type of gain-time earned before release to supervision, or any type of sentence reduction granted to avoid prison overcrowding, including, but not limited to, any sentence reduction resulting from administrative gain-time, provisional credits, or control release. The court shall determine the amount of jail-time credit to be awarded for time served between the date of arrest as a violator and the date of recommitment, and shall direct the Department of Corrections to compute and apply credit for all other time served previously on the prior sentence for the offense for which the offender is being recommitted. This section does not affect or limit the department's authority to forfeit gain-time under ss. 944.28(1) and 948.06(7).